placed on the over all visual get-up of the packets. The judge was wrong to hold that the features of the plaintiffs' get up were common to the trade, when this was not admitted by the plaintiffs and ought to have been strictly proved by the defendants, so that in all the circumstances of the case the total absence of any evidence from the defendants in this regard had the result that the plaintiffs' case remained unanswered and uncontradicted.

I would allow this appeal with costs here and in the court below and make an order for an injunction in the terms of prayer (b) and consequential orders under prayers (c), (d) and (f) in the plaintiffs' statement of claim.

Ali and **Wan Suleiman F.JJ.** concurred.

Appeal allowed.

Solicitors: *Shearn, Delamore & Co.; Shook Lin & Bok.*

ZAINAB BINTI OTHMAN v. SUPERINTENDENT OF PRISON, PULAU JEREJAK, PENANG

[F.C. (Suffian L.P., Lee Hun Hoe C.J. (Borneo) & Wan Suleiman F.J.) June 14, 1975]

[Alor Star — Federal Court Civil Appeal No. 141 of 1974]

Practice and Procedure — Costs — Habeas Corpus proceedings — Whether costs payable — Criminal Procedure Code (S.S. Cap. 21) Chapter XXXII, s. 387.

Habeas Corpus — Costs — No order under the Criminal Procedure Code.

In this case the appellant had successfully applied for a direction in the nature of *habeas corpus* for the benefit of her husband who had been detained in prison at Pulau Jerejak. She applied for costs. (See [1974] 1 M.L.J. 189). The application was refused by the learned judge and the appellant appealed to the Federal Court.

Held, dismissing the appeal: as *habeas corpus* proceedings are in a class of their own and can be taken only under the Criminal Procedure Code, the learned judge was correct in holding that there could be no order as to costs under the Criminal Procedure Code and that there were no exceptional circumstances to justify a departure from the ordinary rule.

Cases referred to:-

(1) *Amand* v. *Home Secretary & Anor.* [1943] A.C. 147.
(2) *Munusamy* v. *Subramaniam & Ors.* [1969] 2 M.L.J. 108.
(3) *C.P. Matthew & Ors.* v. *District Magistrate, Trivandrum & Anor.* A.I.R. 1939 P.C. 213.
(4) *Lee Mau Seng* v. *Minister of Home Affairs, Singapore & Anor.* [1971] 2 M.L.J. 137.
(5) *Lau Lek Eng & 7 Ors.* v. *Minister of Home Affairs, Singapore & Anor.* [1972] 2 M.L.J. 4.
(6) *Wee Toon Lip & 3 Ors.* v. *Minister of Home Affairs, Singapore & Anor.* [1972] 2 M.L.J. 46.
(7) *Lim Hock Siew & Ors.* v. *Minister of the Interior and Defence, Singapore* [1968] 2 M.L.J. 219.
(8) *Ex parte Johannes Choeldi & Ors.* [1960] M.L.J. 184.
(9) *Aminah* v. *Superintendent of Prisons, Pengkalan Chepa, Kelantan* [1968] 1 M.L.J. 92.
(10) *Karam Singh* v. *Menteri Hal Ehwal Dalam Negeri* [1969] 2 M.L.J. 129.
(11) *Assa Singh* v. *Menteri Besar, Johore* [1969] 2 M.L.J. 30.
(12) *Re Datuk James Wong Kim Min* [1975] 2 M.L.J. .....
(13) *Fu Tze Man* v. *Attorney-General* [1960-63] S.C.R. 20.
(14) *Secretary of State for Home Affairs* v. *O'Brien* [1923] A.C. 609.
(15) *Nanyang Development (1966) Sdn. Bhd.* v. *How Siew Poh* [1969] 1 M.L.J. 232.
(16) *Johnson* v. *R.* [1904] A.C. 817.

FEDERAL COURT.

Karpal Singh for the appellant.

Abu Talib bin Osman (Senior Federal Counsel) for the respondent.

Suffian L.P.: The applicant (appellant before us) applied by notice of motion in the High Court at Penang for a direction in the nature of *habeas corpus* for the benefit of her husband who was detained in the prison at Pulau Jerejak. She succeeded and the court ordered her husband's release, see [1975] 1 M.L.J. 76.

Counsel for her then applied for costs against the Superintendent of Prison, Pulau Jerejak (respondent in the lower court and before us). The learned judge refused the application and the applicant appeals to us.

The main ground of appeal is that the learned judge has misapplied the test laid down by the House of Lords in *Amand* v. *Home Secretary and Another.*[1] There Amand, a Dutch national who had resided in England for fourteen years, was arrested as an absentee without leave from the Dutch army in Britain, in which he was a conscript. He was taken before a magistrate with a view to his being handed over to the Dutch military. He applied for a writ of *habeas corpus.* The Divisional Court refused the application. He appealed to the Court of Appeal. By the Supreme Court of Judicature (Consolidation) Act, 1925, section 31(1) "No appeal shall lie — (a) except as provided by the Criminal Appeal Act, 1907, or this Act from any judgment of the High Court in any criminal cause or matter." The Court of Appeal held that it had no jurisdiction to entertain the appeal. Amand appealed to the House of Lords who held that the judgment appealed from was in a "criminal cause or matter" and that accordingly the Court of Appeal had no jurisdiction to hear the appeal. In his speech Viscount Simon L.C. stated at page 155:

"If ... the application for the writ of *habeas corpus* is refused, and the question arises whether an appeal lies against such refusal, a distinction must be made. If the judgment of the High Court refusing the writ is in any criminal cause or matter no appeal lies. If it is not, an appeal is competent. This distinction between cases of *habeas corpus* in a criminal matter, and cases where the matter is not criminal goes back very far."

His Lordship then mentioned the history of the distinction. He then continued:

"It is the nature and character of the proceeding in which *habeas corpus* is sought which provide the test. If the matter is one the direct outcome of which may be the trial of the applicant and his possible punishment for an alleged offence by a court claiming jurisdiction to do so, the matter is criminal."

It will be noted that it is the nature and character of the *proceeding* in which *habeas corpus* is sought which provide the test. Mr. Karpal Singh argues before us that the learned judge did not have regard to the nature and character of the proceeding, but instead had regard to the nature of the *person* concerned, namely, the applicant's husband. With all due

respect I do not think that there is merit in this argument. The learned judge clearly had in mind the nature and character of the proceeding.

The judgment appealed from has been carefully written and with respect I agree with everything that is said in it, and there is little I can usefully add to it. However I would like to say this, that in Singapore one can apply for *habeas corpus* either under the Rules of the Supreme Court (Order 54) or under the Criminal Procedure Code (Chapter XXXIII) and it is possible that costs were awarded in the four Singapore cases mentioned in the learned judge's judgment because the applications there were made under the Rules of the Supreme Court. In Penang, however, as in Seremban, for the reasons given by Abdul Hamid J. in *Munusamy* v. *Subramaniam and Others*,[2] following the reasoning in the Privy Council case of *C. P. Matthew and Others* v. *District Magistrate, Trivandrum and Another*,[3] *habeas corpus* proceedings may be taken only under the Criminal Procedure Code.

I would therefore dismiss this appeal. There shall be no order as to costs.

Appellant's deposit to be returned to her.

Lee Hun Hoe C.J. (Borneo): I have had the advantage of reading the judgment of the Honourable the Lord President with which I agree. Out of respect to both counsel, I add a few words.

Appellant is the wife of Osman bin Mat alias Man Kongo who was detained in the prison at Pulau Jerejak, Penang, under an order purported to have been made by the Minister of Interior. It turned out that there were two orders bearing different dates. The order dated August 6, 1973 was served on the detainee. It seemed that the figure "8" had been erased and the figure "6" superimposed. Also, there was no signature. Having examined the two orders the learned judge quite rightly accepted the contention of the appellant that the order was defective. The other order dated August 8, 1973 was never served on the detainee. So, whatever its validity might be it was clearly inoperative. Consequently, an order for the issue of the writ of *habeas corpus* was made. Costs were reserved. After hearing arguments on costs the learned judge made no order as to costs. He considered the matters to be criminal in nature. He adopted the decision of Abdul Hamid J. in *Munusamy* v. *Subramaniam & Ors.*[2] that such matter was governed by Part XXXVI of the Criminal Procedure Code (Cap. 6) in the Malay States and the application should have been made under section 365 thereof. The corresponding references in Penang where S.S. Laws Cap. 21 applies are Chapter XXXIII and section 387. Appellant appealed.

It was submitted that on question of costs, it was necessary to decide whether *habeas corpus* proceedings was civil or criminal. Although appellant conceded that the affidavit sworn by the State Legal Adviser mentioned criminal activity it was pointed out there was no charge, no trial and no sentence was passed. The main point in this appeal is that the learned judge applied wrongly the test propounded by the House of Lords in *Amand* v. *Home Secretary and Minister of Defence of the Royal Netherlands Government*.[1]

Appellant cited numerous cases to support his contention that *habeas corpus* proceedings is civil in nature and that he is entitled to costs being successful in his application for the issue of the writ. The learned judge dealt with this point in his judgment at page 70 of the Appeal Record when he said:—

> "For myself I have always thought that costs are a matter of discretion but since in the absence of any circumstances justifying an order to the contrary, costs normally follow the event and the court's discretion must always be exercised judicially, the contention of Mr. Karpal Singh was not, with respect, as startling as it sounded."

As regards the Singapore cases, namely *Lee Mau Seng* v. *Minister for Home Affairs, Singapore & Anor.*,[4] *Lau Lek Eng & 7 Ors.* v. *Minister for Home Affairs, Singapore & Anor.*,[5] *Wee Toon Lip & 3 Ors.* v. *Minister for Home Affairs, Singapore & Anor.*[6] and *Lim Hock Siew & Ors.* v. *Minister of the Interior and Defence, Singapore*[7] the learned judge pointed out, with respect quite rightly, that in the absence of arguments on the question of costs they would not be of assistance despite their persuasiveness. The question of practice in Singapore may also be different in such matter. Similarly, in *Munusamy's* case[2] where in a consent order no order as to costs was made there was no argument as to costs. It is true in *Ex parte Johannes Choeldi*,[8] Rigby J. in allowing an application for a writ of *habeas corpus*, awarded costs to the successful applicant. But again there was no argument on costs. Three other cases may be mentioned. In each of the three cases, namely *Aminah* v. *Superintendent of Prisons, Pengkalan Chepa, Kelantan*,[9] *Karam Singh* v. *Menteri Hal Ehwal Dalam Negeri*[10] and *Assa Singh* v. *Menteri Besar, Johore*[11] no order as to costs was made. Again, there was no argument as to costs.

In the recent case of *Re Datuk James Wong Kim Min*[12] where a writ of *habeas corpus* was issued no order as to costs was made. There again was no argument as to costs. It must, however, be pointed out that in Sarawak there is the Prerogatives Remedies Ordinance (Cap. 47) which was formerly cited as the Crown Proceedings Ordinance. By section 3 of the Ordinance it is declared that "proceedings by way of *Habeas Corpus ad Subjiciendum, Mandamus, Prohibitions and Certiorari* shall be deemed always to have been available in Sarawak, since the 1st of January, 1957, to the same extent and for the like objects and purposes as they may, from time to time be available in England." The Rules relating to application for *Habeas Corpus ad Subjiciendum* are contained in a Schedule to the Ordinance. Unfortunately, the Rules are silent on costs.

The fact that the application was initiated by original motion does not necessarily mean that the application is civil. In the case of *Fu Tze Man* v. *Attorney-General*[13] appellant relied on the fact that the High Court Registry in Kuching had given "a criminal case" number submitted that the *habeas corpus* proceeding was, therefore, criminal. Ainley C.J. delivering his judgment in the then Court of Appeal stated that that fact might have misled the appellant's advisers but it could not change the nature of the proceedings. On the same principle the same could be said of the argument in the case before us.

It would seem that *habeas corpus* proceedings are in a class of their own since in some cases they may be of criminal nature and in others of a civil nature. In England the question whether the nature of character of the proceedings in which *habeas corpus* is sought has frequently been a favourite subject for discussion. Perhaps, this question has been most authoritatively discussed in *Amand's* case[1] by reason of the fact that appeal does not lie to the English Court of Appeal from a judgment of the High Court "in any criminal cause or matter." Amand, a Dutch national residing in Britain for a number of years was arrested for deserting from the Dutch Army in Britain in which he was a conscript. His applications for *habeas corpus* were refused by two Divisional Courts in succession. He appealed to the Court of Appeal which held that it had no jurisdiction to deal with the matter. His appeal to the House of Lords was also dismissed. Viscount Simon, L.C. made these observations at page 155: —

"If, however, the application for the writ of *habeas corpus* is refused, and the question arises whether an appeal lies against such refusal, a distinction must be made. If the judgment of the High Court refusing the writ is in any criminal cause or matter no appeal lies. If it is not, an appeal is competent. The distinction between cases of *habeas corpus* in a criminal matter and cases when the matter is not criminal goes back very far."

He then went on to deal with the *Habeas Corpus* Acts of 1679 and 1816 and other cases and added at page 156: —

"It will be observed that these decisions, which I accept as correct, involve the view that the matter in respect of which the accused is in custody may be 'criminal' although he is not charged with a breach of our own criminal law, and (in the case of the Fugitive Offenders Act), although the offence would not necessarily be a crime at all if committed here. It is the nature and character of the proceedings in which *habeas corpus* is sought which provide the test. If the matter is one the direct outcome of which may be the trial of the applicant and his possible punishment for an alleged offence by a court claiming jurisdiction to do so, the matter is criminal."

In the same case Lord Wright in his judgment at page 160 stated: —

"It is in reference to the nature of that proceeding that it must be determined whether there was an order made in a criminal cause or matter. That was the matter of substantive law. The writ of *habeas corpus* deals with the machinery of justice and is essentially a procedural writ, the object of which is to enforce a legal right. The application for *habeas corpus* may or may not be in a criminal cause or matter."

In *Secretary of State for Home Affairs* v. *O'Brien*[14] the Earl of Birkenhead put it aptly that: —

"The writ affords a swift and imperative remedy in all cases of illegal restraint or confinement."

Appellant is put in a dilemma because the application is both under the Criminal Procedure Code (S.S. Cap. 21) and Article 5(2) of the Federal Constitution. Article 5(2) does not say in what manner an application should be made to the High Court for a writ of *habeas corpus*. Appellant relied on *Nanyang Development (1966) Sdn. Bhd.* v. *How Siew Poh*[15] for the proposition that where an Act of Parliament does not specify in what form an application may be made to the court, the application may be made by Originating Motion. There is no relevant provision concerning costs in a *habeas corpus* application under Chapter XXXIII of the Criminal Procedure Code (S.S. Cap. 21). All these matters were dealt with fully by the learned judge who cited *Johnson* v. *R.*[16] where the Privy Council declared that: —

"The Judicial Committee will henceforth adhere to the practice of the House of Lords under which the Crown neither pays nor receives costs unless the case is governed by some local statute or there are exceptional circumstances to justify a departure from the ordinary rule."

Reference was also made to sections 25(2) paragraph 1 of the Schedule to the Courts of Judicature Act. At page 64 of the Appeal Record appellant mentioned that *habeas corpus* proceedings were quasi-criminal. Before us he also said perhaps such proceedings are quasi-criminal. The position was dealt with by the learned judge. He considered that the matter of costs should be decided under the provision of the Criminal Procedure Code and came, with respect, to the right conclusion that "there could be in these applications no order as to costs under the Criminal Procedure Code and there were no exceptional circumstances to justify a departure from the ordinary rule."

For reasons given, I would also dismiss the appeal and agree that there should be no order as to costs.

Wan Suleiman F.J. concurred with both judgments.

Appeal dismissed.

Solicitors: *Karpal Singh, Wong & Co.*

YAAKUB BIN AHMAD v. PUBLIC PROSECUTOR

[F.C. (Gill C.J. (Malaya), Ong Hock Sim & Raja Azlan Shah F.JJ.) June 26, 1975]

[Kuala Lumpur — Federal Court Criminal Appeal No. 2 of 1975]

Criminal Law and Procedure — Identification parade — Accused handcuffed during trial — Whether accused prejudiced.

The appellant had been convicted on a charge of armed robbery. On appeal it was argued (1) that a fair trial of the appellant was prejudiced by reason of the fact that he was kept handcuffed throughout the trial; (2) the verdict of the jury was unreasonable and could not be supported having regard to the evidence of identification by two witnesses at an identification parade which was the only evidence to connect the appellant with the offence.

Held, dismissing the appeal: (1) in the circumstances of this case there was nothing wrong in the judge granting the application that the appellant be handcuffed during the trial and the trial of the appellant was in no way prejudiced;

(2) there was nothing irregular in the identification parades at which the witnesses identified the appellant as the person who had committed the offence with which he was charged;

(3) the summing-up of the learned judge on the evidence in relation to the identification parades was not open to any criticism.

FEDERAL COURT.

Karpal Singh for the appellant.

Lamin bin Haji Mohamed Yunus (Deputy Public Prosecutor) for the respondent.

Gill C.J. (Malaya) (delivering the judgment of the Court): The appellant in this case was tried by a jury in the High Court at Penang on the following charge: